

ARGUMENT

OF THE

CHANCELLOR of *WELLS*

ON

Humphreys (R.)

PROXIES.

R

H A D in the

ARCHES COURT

OF

CANTERBURY,

HILLARY TERM

MDCCXXXVIII.

Latrem laeo ERASM. Adag.

LONDON:

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1738.



THIS Argument arose from an Exception taken by the Chancellor to his Adversaries Proctors, that they had not been duly constituted and appointed by the Parties, either before the Judge, and in Acts of Court, or by true and sufficient Proxies; and to the Validity of all their Proceedings, as had and done by them, without any lawful Warrant or Authority. Whereupon the Proctors petitioned the Judge to indulge them a certain Time to exhibit their Proxies: At the Time assigned them by the Judge, they exhibited Proxies in writing, under the Hands and Seals of their Principals, bearing Date subsequent to the Time of the Chancellor's objecting to them, and their Proceedings; and farther pleaded, that in, and by those Proxies, their Principals not only constituted and appointed them their true and lawful Procurators, but had likewise, to all Intents and Purposes in Law whatsoever, ratified, approved of, allowed, and confirmed, all, and whatever they had theretofore, as their Proctors, expedited, acted, done, and performed for them, or in their Behalf.

A N

A R G U M E N T

O F T H E

C H A N C E L L O R of *W E L L S*

O N

P R O X I E S, &c.

S I R,

TH E Plea now before you, concerns the Nullity of the whole Proceedings, in six Causes of Appeal, the Remainder of nine: Namely, two of Mr *Atwood's*, Archdeacon of *Taunton*; three of Dr *Edmund Archer*, Archdeacon of *Wells*; and one of Mr *John Paine*, the Archdeacon of *Wells's* late Register. These Appeals are brought by these Reverend Dignitaries against their Ordinary; who by compulsory Processes, or the Colour of them, is involuntarily brought hither to answer as a Party to this long Tale of Appeals; and to defend his Judgments, or, what is more extraordinary, the common Processes of his Court.

It will be admitted that such an unusual Number of Appeals, as was never heard of before against one Man in this or in any other Court, carries a strong Presumption of something extremely wrong somewhere or other; I mean, on the Part of the Appellants, or of the Appellate. Either he must have been a very ignorant or an overbearing and oppressive Judge; insomuch, that his Admonitions, his Citations, his common Enforcement of Appearances, his animadverting on an Insult openly put upon him in his Court in the Execution

of his Judicial Office, are all become so many insupportable Grievances: Or the others, the appealing Dignitaries and the Officer, must be taken to be Men of an ungovernable Disposition, so impatient of a Superior, that they cannot brook to be controuled in their Contempt of his Authority; and that being combined and resolutely determined not to submit to his lawful Admonitions, they have hoped, with Impunity, to brave him in his Seat of Justice, under the Umbra of an Authority from this Court.

To screen themselves in such Attempts with a Cloak of Regularity they have resorted hither, and with an Air of Meekness and distressed Innocence, have humbly implored the Aid of the Judge's Office. But the Thing itself speaks their Views, and the Hopes they have entertained: Not that the Matter but the Number of their Complaints will bear down their Judge below, when compelled to attend here as their adverse Party; and that his Fortune will never support the Expence of defending himself in so many Causes, let the Merits of them be what they will. Neither do I at all question, but that such Hopes as these have been much improved, since some unprecedented, unheard of, unwarranted Steps have been taken in another Place, undeserved, unprovoked.

I shall ask no Man's Leave to think or speak of those Steps in this Manner, till some Reason shall be assigned for them; or at least, till that black Roll of Misdemeanours, which some Gentlemen here may have carefully perused, and you, Sir, may have cursorily looked over, shall have gained Confidence enough to see the Light.

This, with another Circumstance I shall soon hint at, which would make any Man in my Place desirous of cutting off the Progress of these Contests, will be my Excuse for offering the Objection now under Consideration: And I must rely on the Candour of all who hear me, that they will not interpret my taking the Advantage of a peremptory Exception to be an Argument of a weak Cause; or that I am distrustful of the Event, should the adverse Parties be suffered to go on in laying open the Merits of their several Complaints.

For I could be content, not only for my own sake, but from a Regard to the Ecclesiastical Jurisdiction in general, that the Merits of these Complaints, should be fully known to the whole Court, or even to the whole Kingdom, throughout which they have been a common Topick of Conversation for four or five Years. And had it not been for the De-

ference I thought due to this Court, where they are yet depending in Judgment, it were easy to have shewn by what Means, Appeals from Interlocutories, that salutary Defence against the first Advances of Oppression, have been already made to me, and may be so to all other Diocesan Judges, the greatest Grievance and Oppression; the Oppression of a Man and his House. But I ought nevertheless to hope, that none of those who have been concerned in the contriving, encouraging, or abetting it, may at any Time, from what shall happen to themselves, be so stung with reflecting on the Part they have born in these Transactions, as to imagine, in the Prophet's Language, the Stones to be crying out of the Wall, and the Beam out of the Timber to be answering them.

I shall but just mention the Occasion from whence all this comes upon the Judges of the Diocesan Courts, their proceeding *ex Officio*; that is, as the Law intends, and as one of the Sages of *Westminster-Hall* explains it, 2 *Vent.* 43. Their proceeding out of Duty, or, according to their Duty. And so, one would think, it should be presumed they always did proceed in every Instance: Until the contrary should be made appear by much better Evidence, than the bare Suggestions which have been at first thrown together into an Instrument of Appeal, or afterwards inserted in the Blanks left for them: Especially since it may be so managed, that to detect and falsify those Suggestions in a legal and judicial Course, shall often grow up into a heavy Incumbrance, eating deep into the Revenues of their respective Offices; tho' their Revenues should not be as they are in my Case, arbitrarily intercepted.

I would make no Reflection upon that new Method of maintaining the Jurisdiction of this Court. But if through a continued Attendance here from Term to Term, in the opening and debating these Appeals, I should be so unfortunate as to take the Small-Pox, a Distemper always more or less rise in this City; and should sink under the Weight of that Calamity, coming upon these other Disquietudes, Harassment, and Distraction of Spirits: He, who now usurps my Office, and invades my Property, would from thence have a better Prospect of retaining it, than from any Application to a Court of Equity, to quiet his Conscience in the Possession of it.

It was scarce possible to forbear touching thus slightly upon Matters, which must needs be always uppermost in my Thoughts: Nor are they quite distant from the Plea under Debate; which is of such a Nature, as goes to the whole

Number

Number, and strikes at the very Roots of these Appeals, which seem to have led the Way to the more notable Exploits. For if this Exception takes Place, as I conceive it ought by Law to do, all the Proceedings in, upon, or concerning them, will be, and will have been from the beginning, mere Nullities; and whatever else has been grafted on them, or shot out extravagantly from the Sides of them, will wither and decay.

The Exception may perhaps be thought too widely peremptory, and for that Reason, may call up all the Industry, Art, Wit, and Eloquence, of more than the adverse Party, to set it quite aside, or else by some ingenious Device, to supply or to extenuate the Defect. But since it lies in Judgment before you, Sir, I shall be under the less Apprehensions from the Influence of Artifice or Eloquence; especially in so clear a Case, where the Defect is fatal and irrecoverable. For what can supply the Want of an Appellant in a Court of Appeal? Or what Jurisdiction can a Court of Appeal claim to have without an Appeal? And how can there be an Appeal without an Appellant? In *Maranta's* Words, *Effet ridiculum sicut nasci Filium sine Patre.*

Whatever Necessity there may be for an Appellate's Appearance, it will not, I presume, be pretended, that there lies any Obligation upon him, to prosecute, or proceed in an Appeal, without an Appearance of an Appellant, much less without any Appellant. I have now used the Term to prosecute, or proceed in an Appeal, as I may have chanced to do before some other Time, for the acting on the Part of the Appellate; wherein I am countenanced by *Brederodius*. It was formerly the Style of this Court, if one may judge from the Marks of it in the Registry of *Wells*: But I shall not contend, if to answer in an Appeal, should be thought the better, as well as the more modern Language. But this by the way.

As to the Necessity of an Appellate's Appearance, if I have been rightly informed, in one of these very Causes in the High-Court of Chancery, a learned, a very learned Doctor of the Faculty insisted, that a Sentence could not be reversed in this Court on an Appeal, without the Appellates appearing. Had I not been prevented by an Artifice from meeting that Doctor at that Time, I should have put him in Mind, that the same Gloss, which speaks of the Obligation on the Part of the Appellant to appear instructed in his Cause, goes on to say, *Secus est de Appellato quia ei non imponitur prosequendi necessitas nisi venire velit, vel solus vel cum Adversario*

Adversario [2. q. 6. ei qui §. Appellatore] & potest negligere causam si vult cum sine ipso possit causa Appellationis tractari, si Contumax fuerit [C. de temp. App. l. ult. §. illud] eo prius citato, [Tit. eod. per tuas] Gl. in Verb. Appellaverit. X. 2. 28. 44. And as I recollect there are many Decretals in Point. X. 2. 28. 58. X. 2. 28. 61. X. 2. 28. 70. Besides that plain express well known Law of the Code, *Hoc speciale Privilegium ejus est qui Appellationi examinandæ præsidet, posse & ex una parte causam dirimere.* [Code, lib. 7. Tit. 63. l. 5.] This remarkable Text could not escape the learned Doctor's Observation, it is much it should have slipped his Memory. Nor would it have been altogether useless to the Credit of the Ecclesiastical Courts, to have cleared the Civil and Canon Law from a Representation, which set it at so wide a Distance from the Course of Proceedings in the Temporal Courts, in Matters which have a near Resemblance to this of Appeals. For who ever heard of a *Capias*, an Attachment, or Writ of Rebellion, to compel the Defendant in Error, or an Appellate to appear? In the *King's-Bench*, and House of Lords, a *Scire Facias* is the farthest of the Process. In the Exchequer Chamber, there is nothing more than an Intimation or Notice; as in some of the Provinces of *France*, where the Civil Law has the Place of the Common Law, the Appellate is called *Intimatus*.

But should it be, as was then insisted on by the learned Advocate, that this Court can't proceed to reverse a Sentence without an Appearance on the Part of the Appellate; will it now be argued that this Court can receive, retain, and proceed in a Cause of Appeal, without a legal Appearance, nay, without the Existence of any Appellant? Shall an Appeal be interposed, exhibited, and an Inhibition and Citation issue upon it, the Appellate's Contumacy accused, an Excommunication decreed, pronounced and published, a *Significavit* filed in the Court of Chancery, Writs upon Writs taken out, Contumacy Fees taxed, and many subsequent Proceedings had; and all this without any Appellant's ever having been legally before the Court, either in Person, or by his lawful Proctor? Yet Mr *Mark Holman*, one of the oldest, and, as I have heard him vouched, one of the fairest Practitioners in this Court, goes on in all this under the Colour of a Procuratorial Authority; though in the Eye of the Law, he is a mere Extraneus, and has no Interest. *Inter Personas quarum interest non continetur falsus Procurator.* Note on ff. 39. 1. 13. He was no Proctor in the first Instance, neither could he have a lawful Authority

thority for interposing an Appeal: I remember a Rule of Justinian's Law, *In aliena causa qui judicio expertus non est appellare non licet.* ff. 49. 4. 2.

This Rule agrees with, and is declared to be the Law of the Realm, by the Statute of Appeals; which directs all Appeals to be had and made, not by one Man in the Behalf of another, nor yet indifferently by any Man, who shall be desirous of bringing Business into this Court, but only by the Party grieved, or having cause of Appeal; whence then comes it, that Mr *Holman*, a Proctor of this Court, who was no Party to this Suit in it's first Instance, nor was ever known to procure in the Consistory of *Wells* in any Cause, should reckon himself to be so much affected by what was done there, as to be intitled to the Remedy, which the Law gives to a Party grieved? All that we are allowed to know of that Matter is, that he went before some Notary here, and pretending to exhibit a Proxy he made himself a Party with Dr *Archer* in a Cause commenced, and then depending in the Consistory of *Wells*. And in the same Way he may make himself a Party in any, or all the Causes now depending in that, or any other Ecclesiastical Court, without ever being called, or offering himself as such before the Judge of that Court, or in the least apprizing him of his Intentions of being such. A strange Absurdity this, to have a Place in a legal Course of Justice! And yet it is an Absurdity which Mr *Holman's* Method unavoidably runs into, before ever he can bring his Appeal within any Kind of Conformity to the Directions of the Statute. For it is impossible, he should be admitted to have been a Party grieved in any Cause, unless he shall be first admitted to have been a Party in it.

There is a Statute of this Court which has much the same View; to restrain the Officiousness of Proctors, in appealing from Interlocutories and Grievances, which no Way concerned them. For in appeals of that Sort, when made by Proctors, it requires, that it shall be made appear, not only that the Proctor appealing, was the Party's Proctor in the first Instance, at the Time of the Grievance he complains of, but also that he gave the Judge *a quo* full Evidence that he was so. The Words of the Statute are, *Cum Processus Judicis a cujus gravamine vel Interlocutorio suggeritur Appellatum ex solis Actis habitis coram ipso & non ex novis probationibus in posterum faciendis justificari debeat, & etiam impugnari; non sufficit Parti per Procuratorem appellanti in Appellationis causa probare se Appellantis Procuratorem tempore illati*
Grava-

Gravaminis extitisse sicut fieri consuevit, nisi etiam probet quod Judici à quo se asserit appellasse fecerit de suo Procuratorio plenam fidem. Quod non solum in directis Appellationibus sed etiam in Tuitoriis si à judiciali gravamine appelletur volumus observari. [De Appellationibus interpositis per Procuratorem.]

I am willing to acknowledge that this Statute, as well as that of Appeals, makes no Allowance to the superior Knowledge and Experience of any Proctor: They are all indiscriminately confined to their own Business, and to their own Courts; the Proctors in the Diocesan Consistories can appeal to this Court from no Sentence, or Decree pronounced there, unless it was in some Cause, wherein they were themselves retained, and admitted to be Parties in the Suit; and the Proctors of this Court, with a legal Proxy, may exhibit and prosecute any Appeal that has been made to it by the others, but they cannot themselves appeal to it in any Cause. These Restraints are so unfriendly to the Proctors of distinguished Abilities, that one could hardly expect they would contentedly submit to them, were it not for their Regard to the publick Good. For there are such Offences at Common Law, as Barrety and Maintenance, which the Temporal Courts are strict in suppressing; and were it not for such Statutes, as I have been speaking of, what is carefully kept out of the Temporal Courts, might possibly gain Admittance into the Ecclesiastical ones.

This, Sir, should have kept Mr *Holman* from appealing to this Court, though the Parties who pretended to have been grieved, had expressly desired it of him; and sent him Proxies for the Purpose, to give him the Colour of an Authority, for what he was to do. But since he would venture to do that without a Proxy, which no Proxy could have authorized him to do; there is the less Reason to wonder that he should go on without one in his farther Progress, wherein it would have been of real Use to him to have had one.

But I would beg leave to attend this fair Practitioner a little farther, and observe his Steps. When, by the Help of his Friend the Notary, he had made himself in his Way a Party in a Cause depending in the Consistory of *Wells*: He interposes an Appeal, prefaced in this Form. “ In the Name of God, Amen. Before you a Notary Publick, approved and allowed by Authority, and Witnesses of good Faith and Credit here present, I *Mark Holman* Notary Publick, one of the Procurators General, and Exercent of the Arches Court of *Canterbury*; and as such, and un-

“ der such Denomination, do exhibit my Proxy for Dr *Ed-*
 “ *mund Archer*, (or Mr *John Paine*) and make myself a
 “ Party for him, and with design to appeal from, and com-
 “ plain of the Nullities, Iniquities, Injustices, Grievances,
 “ and Errors in proceeding herein after mentioned, and
 “ equally and principally complaining of them, do by this
 “ Writing, say, alledge, and in Law propound that - - -
 I have called this the Preface, but there is great Reason to
 suspect, it was the whole in some of the Appeals that was
 written or read within the fifteen Days, or a considerable
 Time after. I should scarce have mentioned such a Suspicion
 at this Time; but that the Backwardness I find in getting
 the original Instruments produced, is continually confirming
 it. Now if Mr *Mark Holman* had no Proxy at this Time,
 as I think if he had none, he could exhibit none; what a
 most solemn Falshood is here ushered in, “ In the Name of
 “ God, Amen.” I think, if he falsified in this, (whether
 he did or not he best knows) it falls little short of forswear-
 ing; but that the introducing any Business into this Court
 without a lawful Warrant, and leaving Evidence of it in the
 Registry, comes fully up to a Breach of the Oath, the
 Proctors General take to observe the Statutes, will appear in
 what I have to offer hereafter. But let us go on to the
 Conclusion, and see how much fairer it is than the Begin-
 ning. The Attestation, at the End, of the Notary Publick,
 witnessed by the Witnesses of good Faith and Credit, is, that
 this Appeal was interposed, on such a Day, of such a Month,
 in such a Year, at such a Place, by the said *Mark Holman*,
 the Procurator aforesaid, who then and there appealed, pray-
 ed Letters Dimissory, and did all Things as in the above
 written Appeal is contained. The Notary Publick attests,
 and the Witnesses subscribe. It is contained in the Instru-
 ment of Appeal, that he exhibited his Proxy: Now if he
 had really no Proxy, what a complicated Breach is here of
 publick and private Faith? It may seem but a small Defi-
 ciency, which leads to so much Disorder; but Irregularities
 in these, as well as in moral Matters, *Stant in præcipiti*. - - -

Hitherto Mr *Holman* must be considered in the Capacity
 of a Proctor in this Cause, in it's first Instance, in the Court
 of *Wells*; but having, as he imagined, suspended the Juris-
 diction of that Court, by appealing to this, he returns again
 to his proper Station, where we soon find him conducting
 and prosecuting the Appeal he had interposed. His first step
 brings him before you, Sir, or your Surrogate, where he al-
 ledges, it had been appealed; an Allegation, I repeat it
 again,

again, which wants to be cleared from a violent Suspicion of a deliberate premeditated Falshood in two, if not more, of these Causes. In the next Place, as he asserts, he exhibits his Proxy; and has it entred in the Acts of Court, that he had exhibited it; the Register, it may be, attending more to what he said, than what he did. 1. Thus, Sir, in contempt of your high Character and Dignity, he does what in him lies to derogate from the Credit, and violate the Sacredness of your publick judicial Acts. 2. But this shews he had a just Sense of what he ought to have done, and what the Law and the Court expected from him.

No Proxy being left in the Registry, he was called upon to exhibit it in Court; whereupon he prays an Indulgence to the next second Court Day, and then exhibits a Proxy, bearing Date subsequent to the Time an Objection had been made, that it did not appear, he had been duly constituted the Parties Proctor. Will not you, Sir, and the Law intend this, as an Admission, in a Manner a judicial Confession, that he had no Proxy before. He did not then, nor does he now offer to charge the Notary Publick, or the Register of this Court, with the mislaying or losing the Proxy he had deposited with either of them; nor does he attempt any Account of what is become of it: Though your Indulgence for two Court Days might be understood to mean no more than to give him Time to search for the Proxy he had not left, as he ought, in the Registry, but might have mislaid somewhere else, however unwilling he might be to say so. For I assure myself it was not intended as a Snare to him, to give him an Occasion of convicting himself of the whole Charge, that from the Face and Appearance of Things, might have been suggested against him; and in a Manner of calling upon you, Sir, in open Court to seclude him from the Exercise of his Office, for the Space of two Months, without hope of release or restoring, as the 129th Canon of the Constitutions of 1603 requires.

Upon this footing then, that he had no legal Authority from the Persons, in whose Names he has done all this, I shall beg leave to take some Notice of what the Law has directed and provided in such Cases; both with Regard to the Acts done, and the Proctor doing them.

The Penalty just now mentioned is annexed to a Prohibitory Clause, in Terror of the Proctor; but I apprehend the Canon reaches beyond him, and renders every Thing a Nullity, that is done against it. *Quod fit Lege prohibente pro Insesto reputatur.* It was so adjudged in a Court o

Westminster-Hall, in the Case of *Bethill* against *Parry*. *Palmer* 151. By the Statute of *York* 12 *Ed.* 2. 5. " Sheriffs and
 " other Bailiffs shall put their own Names with the Returns
 " of Writs. And if any Sheriff, or other Bailiff, leave out his
 " Name in his Returns, he shall be grievously amerced to
 " the King's Use. *Mountague* doubted, if a Return without
 " the Sheriff's Name, was erroneous upon the Statute of
 " *York*; For the Common Law was, that the Return with-
 " out the Name was good; and the Statute says, that the
 " Sheriff shall, &c. and if he doth not, then inflicts a Pe-
 " nalty upon him: So it seemed to him, that it did not make
 " the Return void, but punished the Sheriff. But all the
 " other Justices held, that the Common Law is changed by
 " the first Words, the Sheriff shall, &c. and the Penalty is
 " in terror of the Sheriff."

There is a Difference between the Statute and this Canon in one respect: The Directory Words of the Statute changed the Common Law of the Land; whereas the Prohibition of the Canon, is in Affirmance of the Common Ecclesiastical Law, and of the Canons of the Church, and speaks the same Language with the Statutes of this Court. Besides so much of the Temporal Law as concerns Ecclesiastical Matters, I take the King's Ecclesiastical Law, to consist of the Common Law of the Church, the Legantine and Provincial Constitutions collected by *Lyndwood*, and the later Canons of Queen *Elizabeth* and King *James*; I have presumed to include the former, notwithstanding what is insinuated in the *Codex* concerning them.

It has certainly been received from the Civil Law, and become the Law of all Ecclesiastical Judicatories, that *Falsus Procurator non gerit nec repræsentat Personam Dni*. This farther Rule of the Law of the *Code*, is likewise transplanted into the Decretals. *Falsi Procuratoris Exceptio non solum ante Sententiam, verum etiam postea potest objici, utpote, qua probata, Judicium nullum & nullius momenti Controversiæ reputantur.* C. 2. 13. 24. X. 1. 38. 4. The Gloss on the Words *Falsus Procurator*, in the Law of the *Code*, is, *Falsus dicitur qui non habet mandatum*.

Mandatum is a general Word; and in Case of an Exception against a Proctor's Authority, there would be room for questioning, what should be deemed a sufficient Warrant. I need not inquire how such Questions were heretofore prevented or determined. For whatever the Legal Form of the Proctor's Mandate might be before the Constitution of *Osbo*, (*Usum Procuratorum*); whatever *Constat*, or Proof of

of such Mandate, might be required or accepted of; that Constitution, rectifying an Abuse in the Frame, and providing a Remedy for the Difficulty and Uncertainty of the Evidence of a Proctor's Mandate, enjoins this Formality to be added to it: *Mandatum etiam per Scripturam probetur authenticam nisi apud acta fuerit Constitutus, aut signum Authenticum de facili nequiverit Constituens invenire.* John de Athon's Gloss upon the Word *nequiverit*, is, *Cum Sigillum Authenticum haberi non possit; tunc sufficit proprium ipsius Constituentis.* So that since Otho's Time, for five hundred Years, it has been a constituent formal Part of every Proctor's Mandate to be in writing. *Ubi Lex vult quod aliquis actus celebretur in scriptis, illa Scriptura dicitur Forma illius actus.* Maranta. I conceive since the Statute of Frauds and Perjuries, a Deed or Note in writing, is a formal Part of every Assignment, Grant, or Surrender of all Leases, Estates, and Interests; that a Memorandum, or Note in writing, is essential to all Agreements therein mentioned, upon which an Action shall be brought; that writing is not only an Evidence, but a Formality of every Devise of Land: And in all these likewise a signing by the Party, or in the Case of a Will, by his express Direction. So I apprehend a Seal is necessary to a Proctor's Mandate; tho' it may not have been always insisted on in this Court: But then Mr Oughton on that Head, says, *Remissius & minus accurate practicitur.* I think, Sir, I may advance yet farther upon the Strength of some late Statutes, and say, that not only the Party's Seal, or rather some authentick Seal, but an Impression from the Officers of his Majesty's Stamp-Duties, is essential to the Validity of a Proxy. But of this I may have Occasion to speak more hereafter.

The Provision of Otho, for a more certain, as well as ready Constat of Procuratorial Powers, is supported and guarded by a Provincial Canon. *Lyndwood, de Procuratoribus, Exhorrenda.* This Constitution wards against the fraudulent, or inadvertent putting of an authentick Seal to Proxies; and enacts a Punishment on those of an higher Order than Proctors, who shall be concerned in such Deceit; and as to the Acts done, it says. *Id quod per talem fictum vel falsum Procuratorem actum fuerit, vel procuratum, modis omnibus pro Insecto reputetur.* I must submit it to you, Sir, whether all Acts done by any feigned or false Proctor, whether he gains his Character of Falshood, by his deceitfully obtaining an authentick or a private Seal, or by his relying on a Mandate unsealed, unattested, or unwritten, be not equally

equally within this Clause of the Canon, as they are equally within the Mischief generally designed to be obviated by the whole of it.

The Words *per talem fictum vel falsum procuratorem* have indeed a Relation to what had gone before. The deceitful obtaining an authentick Seal, being then the most common means of introducing the general Mischief of an Appearance without lawful Authority, might be most in the Eye of the Archbishop and his provincial Council. But where a Mischief is general, and a Constitution provides against one better known and more common Mode of it, though the Words by their Relation may seem to be restrained to that one Mode, they have been taken to extend to the whole Mischief, and construed in the fullest Latitude. Give me Leave, Sir, to refer you to my Lord *Coke's* Select Cases, and to a Case in the beginning of the Book, (*Porter and Rochester*,) that concerns this Court.

Before I leave this Canon, though I shall not petition for a Decree upon it, yet I would submit it to your Judgment, whether Mr *Holman*, who so solemnly declared that he exhibited his Proxy, obtained, I know not how, an Attestation of, and a Subscription to, the Truth of it, and stole it into your Acts, if all this Time he had no Proxy, or hath admitted that he had none, does not come within the Reach of the next Clause. *Procurator autem ipse totius Falsitatis intentatur ab omni actu legitimo perpetuo repellatur.*

However you shall be pleased to enlarge or restrain the Construction of the Provincial Constitution, King *James's* Canon before-mentioned is undoubtedly general, the Title is *Procuratores nisi de Partis Mandato authentico Causas attingere prohibiti*. The Canon is as follows. *Nullus deinceps in aliqua Causa procurabit, nisi ab ipso litigante apud Acta Curiae fuerit Constitutus, vel in ipso Litis Ingressu illius vero & sufficienti Procuratorio fulciatur. Sufficiens vocamus, quod Authentico aliquo sigillo munitur, approbatione item aut saltem Ratificatione Constituentis eidem accedente: Ejusmodi vero procuratoria omnia quamprimum confici volumus & à procuratoribus exhiberi ac in publicis ejusdem Curiae Scriniis per Registrarium salva custodiri.*

But the Constitution that comes nearest and bears hardest upon the Proctors of this Court, who have acted thus irregularly under feigned Authorities is yet behind: It is one of the Statutes given to this Court by Archbishop *Stratford*, and is intitled *De procuratoribus Curiae Cantuariensis*. If the Proctors, at their Admission, take the Oath enjoined by this same Archbishop's

Archbishop's Statutes, I should judge that a Breach of this Statute, if wilful, carried in it a wilful Breach of an Oath. This is the Tenor of the Clause in the Statute. *Procuratores autem dictæ Curie in eadem nullam Causam vel negotium introducant, quousque de Mandato suo Judici Parti adversæ ac Clerico nostri Registri fecerint plenam fidem; & si Mandatum exhibeant speciale pro negotio introducto Originale ipsius penes Registrum volumus remanere, & utrique Parti Copiam fieri de eodem, Signo Registrarii consignatam, sumptibus Partis Copiam hujusmodi habere volentis. Quod si Mandatum fuerit generale, tunc illud exhibens det nostræ Curie Registrario istius Mandati Copiam, antequam Originale Procuratorium exhibenti reddatur eidem; quæ etiam per ipsum Registrarium omnibus, quorum interest, fiat expensis petentis quoties opus erit.* Can Mr Holman hope to persuade you, Sir, to supersede this Statute, because he has broke through it. I doubt not, Sir, but this Statute, as well as the rest, will be of sacred Authority with you. In Times past they may not have been so fully enforced as they might have been. I should not touch upon this Point, but under the Authority and in the Words of the greatest Civilians of the Time. Dr Jones very frankly says to the Archbishop, I take it to have been Grindall, then much bent upon a Regulation of his Courts. "May it please your Grace to understand, that divers Archbishops, your Predecessors, have in Times past, minding the like Reformation, made very good Statutes for the Court of Arches. And every Person at his Admission taketh an Oath to observe the same, as far as they be not contrary to the Laws of the Realm; yet all the Judges of the said Court, for my Time, have neglected to see the said Statutes duly kept and put in Execution, as they were bound, and should have done: The which Thing I take only to be the very Cause of all evil Disorders and Abuses in the said Court."

Dr Yale also, who was Judge of the Court of Audience, as the Historian relates, thus signified his Mind to the Archbishop for the Reformation of that Court. "In your Graces Court of Audience, as in all other your Courts, so Things be out of Order that few Things be as they should be. Good Orders and Statutes sworn rejected; gainful Customs contrary to Oaths for Laws received: Oaths and Perjuries by Custom made current. For Redress whereof my Opinion is, that necessary it is to give out Statutes to rule all your Graces Courts with few Additions. And that the same Statutes may be better observed than they
" are,

“ are, and to avoid such horrible Perjuries as wilfully be
 “ committed in the voluntary neglecting of them, being
 “ publickly sworn unto by Judge, Advocate, and Proctor,
 “ that greater Pains, and more severe Punishments, be im-
 “ posed upon all the Judges not urging due Observation
 “ thereof, and upon all other Transgressors.”

These, Sir, were Men of Character and Station: They saw Disorders in the Archbishop's Courts at that Time, and had Courage enough to own it, notwithstanding the ill-will they might expect from the Delinquents. I do not mention it as an Intimation that there are the very same Disorders now, (which is nothing to my Purpose,) but as an Evidence, that the Statutes of this Court were then thought to be in Force, and worth observing, as the best Means to root out and keep out irregular Practices. What I chiefly would rely on, is, not the Statutes or Ordinances of this or that Court, but the Canons and Constitutions, the Ecclesiastical Law of the whole Kingdom: And from thence I hope it has sufficiently appeared, that the Exception taken to Mr *Holman*, and his proceeding without a Proxy, is well grounded.

Nor is this Matter of Proxies such a mere Peculiarity of Ecclesiastical Courts as has no Foundation in Reason, but may be taken up or laid aside at Pleasure: For all Courts have, and must always have, something of the like Kind. The Temporal Courts have their Warrants of Attorney, which answer the same Ends there in some Respects, as Proxies do here. For which Reason I presume, it will not be superfluous to shew out of the Books of the Common Lawyers, what Influence the want of a Warrant of Attorney has upon the Proceedings in those Courts.

The want of a Warrant of Attorney, if it appears from the Record, is always Error at the Common Law. Upon the Assignment of this Error many Judgments of the Court of Common-Pleas have been set aside in the King's Bench. The Books are full of this Doctrine.

Home poet assigne Defalt de Garrant de Attorney de son Attorney demefne que est pur son Advantage. 7 H. 4. 16. & son defalt demefne. 11 H. 4. 44. 88. Rolls Ab. 757. Again 760.

Si al grand Cape return le Tenant gage son Ley per Attorney qui n' ad ascun Garrant de Attorney, & al jour que il doit faire son Ley il fit Defalt & Judgment done, uncore le Defalt del Garrant del Attorney continue un Error pur ceo que est Discontinuance. 783.

Si le Tenant appiert per Attorney sans Garrant d' Attorney ceo est Error. 11 H. 4. 88. 6. 7. H. 4. 16. 11 H. 4. 44. 792.

Attorneys

Attorneys have been committed for not entring or filing their Warrants. *Bro. Attorney* 14. 41. *Ed.* 3. 1. *Rastall's Entries. Attorney* 2.

An Attorney has been forejudged his Office for appearing without Warrant, by which a Judgment was erroneous. *Rastall Attorney* 3.

An Outlawry at Common Law, which is of a similar Nature with an Excommunication in the Ecclesiastical Courts, is, and always has been erroneous and reversible, for want of a Warrant of Attorney; and an Excommunication, as part of the Proceedings in Question, is now contended to be null for the want of a Proxy. I need not bring Authorities from the Books; it is so recited in the Statute of the 18th of *H. 6. cap. 9.* "Our said Lord the King, considering moreover like Damages, which happen as well to him, as to his poor Liege-People and Subjects, for that in the Records of divers and many Outlawries the Entry is, that the Parties do appear by their Attorneys, where the Attorneys have no Warrant of Record, by Reason whereof of the said Outlawries be reversible, and for the most Part reversed, hath ordained by the Authority of this present Parliament, &c." This Act concludes with a Penalty of forty Shillings on every Attorney, that hath not his Warrant entered of Record, the same Term in which the Exigent is awarded, or before.

There is an Entry in *Rastall*, where an Outlawry is reversed for want of a Warrant, and the Attorney mulcted in Pursuance of this Statute. *Super quo Scrutatis Rotulis Warrantorum Attorn' in Banco hic existent' nullum invenitur nec habetur Warrantum pro præd' I. W. in loquela præd' prout I. A. superius allegavit. Ideo consideratum est quod utlagaria præd' evacuetur cassetur & pro nulla penitus habeatur, quodq; præd' I. H. inde exoneretur & ea occasione in aliquo non molestetur nec gravetur sed eat inde quiet' &c. & quod præd' I. W. forisfaciat D^{no} Regi XLs. juxta Formam Statuti.*

In some Cases, as after Issue tried, by the Statutes of *Jeofails*, want of a Warrant of Attorney shall not be assigned for Error; but the Attorney shall forfeit ten Pounds, and suffer Imprisonment at the Discretion of the Justices.

In filing Warrants of Attorney at Common Law there is some Latitude; because the Warrants are without Date, no more than *Talis ponit Talem Attornatum suum*. They are likewise filed without Date, and being found of Record, are presumed to have been so, in due Time, and the Time cannot come in Question. So the Book, *Le Temps del entre*

ne poit vener in debate ne estre trie lequel il fuit resceive a un Temps ou a auter mes il serra entend que il fuit resceive al Temps que le Attorney respondre & ceo ne fuit que un Default del Clerke que il ne fuit entre avant per l'entendment & auxi serra entend que il fuit de Record. 8 H. 4. 20. But Proxies must be more precise and particular in several Respects: As *Emericus de Rosbach* says, *Annus & Dies Instrumento Procuratorio inferendus*; so that the Time of their Execution may be questioned, and the Commencement of the Power and Authority conveyed by them. The Time of filing or registering them, is likewise appointed; it must be in *Ingressu Litis*. And there are other Formalities to be observed in them, which I had Occasion to speak of before. I shall therefore conclude from hence, that as far as Warrants of Attorney agree with Proxies, the Temporal and Ecclesiastical Laws, concur in making each necessary. The Differences betwixt them are such, as the Ecclesiastical Laws expressly direct; and I shall therefore presume this Court will take Notice of, and maintain them.

There is one Thing more I shall beg leave to offer, which is of a later Date than any Thing already spoke of; and tho' it be not itself a Law, it will clearly shew that the Laws relating to Proxies, are not yet pretended to be antiquated or obsolete. What I mean, is an Argument held but the last Term in the Prerogative Court, which I take the Liberty to remind you of; an Argument of a learned Advocate upon this very Head of Proxies, so clear and cogent, that it extorted from the adverse Advocate, an Admittance of all he had advanced; who, if I apprehended him right, farther allowed, that it was necessary not only by Law but Practice, in all Ecclesiastical Courts, except the Prerogative, to have a Proxy; or otherwise all Proceedings were null.

He flung out indeed one Thing, either designedly or at a venture, which did not seem so well to comport with his Concession; namely, that the Authorities of Law, which had been cited, were calculated for Proctors at large, not admitted or matriculated in any Court. If any thing was then meant by this, I expect to hear of it again, and therefore may now say; it will be hard to find such Proctors allowed to practise in any Courts. Nor can I apprehend, that because one is admitted to be a Proctor-General in any Court, he thereby becomes the particular Proctor of any Suitor to that Court; or can act for him, without an Authority from him. There are Attorneys of Record in the Courts of *Westminster-Hall*; yet, in all Suits brought or defended

sended by them, they must have a special Warrant from their Masters. They are not only to be Attorneys of Record, but are to have Warrants of Record. Nor has it been otherwise in any Courts of the Civil or Canon Law. Dr Zouch has it thus, in his *Elementa Jurisprudentiæ. Usus Procuratorum perquam necessarius est, ut qui rebus suis superesse ipsi vel nolunt vel non possunt, per alios possint vel agere vel conveniri. Hujusmodi vero procuratores, primo ex eorum numero esse debent, qui Authoritate publicâ admissi, ad Forum pertinent. Deinde Mandato niti debent, quippe Procuratorem eum accipere debemus cui mandatum est. Part. 5. Sect. 3.*

The learned Advocate's Distinction between the Prerogative and other Ecclesiastical Courts, was no new Thing to me; I had concluded as much from Dr Lloyd's and Lane's Arguments, in the Case of *Willmot, vers. Lloyd. 5. Ann. B. R.* It was moved for a Prohibition to the Court of *Worcester*, on the Bill of Citations; and opposed, for that the Party had submitted to the Jurisdiction, by appearing and pleading by his Proctor: To which Objection, Dr Lloyd replies; There is no Procuration appears to be on the Proceedings; which is in the Nature of a Warrant of Attorney. Dr Lane rejoins; Dr Lloyd knows, that it is the common Practice of the Prerogative Court, to answer by Proctor; and yet no Procuration is required: But if the other side do insist upon it, as they seldom do, then it is shewn. From this I collected, that the Prerogative Court had its peculiar Practices or Privileges. For if instead of the Prerogative Court only, Dr Lane could have referred to the Practice of all the Archbishops Courts, and had believed, that the Practice in those Courts, was to be the Model of all other Ecclesiastical Courts; it had been so very much to his purpose, that I judged he could not have omitted it. For he knew well enough, that an Argument à *Particulari* was inconclusive; and would never have contented himself with such a one, if a better had been so near at Hand.

What was allowed in the Prerogative Court last Term, to be the Law and Practice in all Ecclesiastical Courts excepting that, I shall be the more confident, will be now adjudged to be so; because Mr *Holman* by his Plea, in effect, admits and confesses it: Though he would avoid the Force of it, by producing and pleading a Ratification from his Principals, of so late a Date as the 29th of last *November*. A Ratification of an unusual Kind, as well as for unusual Purposes. A Ratification, not as one would expect to find

it, of all he had done in their Names, but of all he had done in their Behalf.

It is but lately, Sir, that I have met with the Opportunity, or rather the Necessity, of acquainting myself with the Practice of this Court: And for that Reason, when I had at any Time discerned any Points of Law or Practice clearly and unanimously laid down in the Books, I accustomed myself to hesitate, and to proceed diffidently upon them, lest some Modes of Practice introduced here, for the Benefit of the Subject, as one would suppose, and the more commodious Administration of Justice, should enervate or defeat them. I may acknowledge myself to have been in the same State of Mind upon the Point of Proxies, till I had, with great inward Satisfaction, discovered by the Argument in the Prerogative Court, that the Law and Practice in that Respect were admitted to coincide. There was not indeed at that Time, at least I did not observe there was, any Intimation given out, that a subsequent Ratification would supply the Defect of a precedent Proxy: But when I found Mr *Holman*, that experienced Practitioner, producing and relying on such a one, the Doubts and Hesitations which I had so lately buried, revived again; and I began to suspect, that this must needs be a Mode of Practice; though my Way of Life and Business in the World had, till that Time, secluded me from any Knowledge of it, or Acquaintance with it. It occurred immediately, that if it should be Practice, it must have crept in in Despite of Law, and in Defiance of the Statutes of this Court; and if it should have crept in so long since as the Time of the Doctors *Jones* and *Yale*, possibly they might have this, among other Things, in view, when they acknowledged and complained of bad Customs, and Breach of Oaths.

But what of all this! the Matter of Fact was properly the first Question: Was it the Practice of the Court, or was it not so, was worth enquiring after. I had searched the Acts of Court in the Registry of *Wells* for 200 Years back; and there were no Traces of any such Thing. Nor could I hear of any Instance of it in the Records of any Bishop or Archbishop of this Realm. The present Practitioners in this Court, had known or seen nothing of it for forty Years. So that, as far as I can learn, even Practice, with it's dark Coverts, so frequently resorted to when Law pursues, will discountenance Mr *Holman* in his new Project, and disclaim his Plea: Practice, that never-failing Parent and Protector of unwritten Traditions, and the great Idol of the Gentlemen
of

of his Profession; though since my Attendance here, I have sometimes seen them wavering and uncertain, as much at a Loss as those that bow to an unknown God.

When I speak of Practice, I mean the Practice of our own Courts, and not of any particular Court abroad; such as the Imperial Chamber; where not only Proxies, but all other Substantials of Judgment are disregarded. Mr Gaill cites a Case in that Court, (*Habsberg & Majorin*) wherein it had been adjudged, that a Ratification should prevail, even after Sentence; contrary to the *Jus Commune* he himself had immediately before laid down, as unanimously agreed to by the Doctors. He endeavours at some Reasons to support this Judgment; and is answered at large by *Andreas Faschini*, in a Chapter on purpose, too large to trouble you with a Recital of it. Mr Gaill has best accounted for that Judgment, where he did not design it, by this Remark. *In Camera Imperiali nullitates processus, si alias de meritis Cause ex actis sufficienter & liquido constet, regulariter non attenduntur, ita disponente Ordinatione Camerae. Obs. l. 1. Obs. 42. N. 1.* For it is every where, in general, as *Maranta* says: *Hanc Exceptionem Tu non es Procurator, semper & in quocunque Foro opponendam esse Scribentes ubique sensere. Et adeo verum esse id Scribentes inquit, quod si opposita Exceptione prædicta expresse non providetur Pars dicetur gravari quod appellare potest. Maranta de Exceptione, N. 55.* But if any particular Court abroad has it's peculiar Statutes or Ordinances, as this Court has, I shall be content if each Court observes it's own; without obtruding them on others, which have no Relation to it.

But it may be that Mr *Holman* does not pretend his Plea to have been yet made a Part of Practice, and only offers it as a Candidate worthy to be introduced, and take it's Place for the future. The Men of a Genius, in all Professions, shew themselves chiefly by Inventions and Improvements. The World thrives by their Means; and while it enjoys the Benefit of their Discoveries, it remembers their Names with Honour, when their Persons are forgot: And should Mr *Holman* have had it in his View to distinguish himself to the Gentlemen of the Profession in future Ages, by this new Scheme of a Ratification, he could not wish to have a better Recommendation handed down with it; than that upon his first Trial of it, when he had dragged in a refractory Diocesan Judge before the Court, he held him down fast with it just when the Law had like to have redeemed him.

Inventions

Inventions of the greatest Note have often taken their Beginnings from Accidents; or from some remote Hints, which had been carelessly overlooked: Tho' the Authors of them have not in all Cases reckoned themselves obliged to acknowledge as much. There is one of the *Regulæ Juris* that runs through the Civil and Canon Law, which may have served in Quality of a Hint upon the present Occasion: And I do not doubt, but it will be brought in to defend the Plea. The Rule I mean is this, *Mandato æquiparatur Ratihabitio & retrahitur*; which by some is expressed more fully; *Mandato æquiparatur Ratihabitio sequens, quæ tantum operatur quantum Mandatum præcedens*. Now a Proxy is a *Mandatum*, and is frequently so called; and therefore by this Rule, a Ratihabition will at any Time supply the want of it. So one would think, Sir, if we were to attend to Words only; and the whole Law of Proxies would be at once destroyed. I shall therefore beg leave to open that Matter somewhat more fully.

Mandatum has a general, comprehensive Signification in the Civil Law; and it is said to be formed and perfected by Consent alone, that is, a Consent without any Solemnities, *Mandatum consensu perficitur*. Whoever transacts or manages any Affair of another Person with his Consent is understood to do it, *Mandatu* or *ex Mandato*, in the Sense which the Civil Laws puts upon that Word. Nor does it much import, whether that Consent be given before or after the Thing be done; or in what Manner, or by what Signs it be expressed and made evident; whether by a Letter, by a Messenger, or by a Nod, or even tacitly, by knowing without forbidding the Thing to be done, or ratifying it when done. This, as I take it, is the general Notion contained under the Word *Mandatum*; and from the Nature of the Affair to be transacted, as well as from the Persons who are to be concerned or affected by it, it takes it's specifick Differences, and, in some Instances, a distinct specifick Name. If the Mandatarius is himself satisfied of the Mandator's Consent, he is by that alone empowered to undertake and manage the Affair committed to him: But should it be an Affair of Consequence, or of such a Kind, that other Persons must necessarily be dealt with to act with him, or submit to what he does; it will be requisite not only that the Mandatarius be himself satisfied of the Mandator's Consent, but he must likewise have at hand such Evidence as shall satisfy those other Persons, that he hath that Consent; and
likewise

likewise the Power or Authority he assumes to exercise in the Mandator's Name.

Now this Evidence will be expected to vary, as it ought to do, according to the Nature or Quality of what is to be done. Sometimes such Evidence is sufficient, as reasonable Men use to rely upon in the common Affairs of Life; at other Times, such a Degree of Evidence may be necessary, as all Men are bound to acquiesce in, in all Affairs; that is, such Evidence as is in Law accounted full Proof. But since Nature or Reason has not exactly marked out, and distinguished these several Degrees of Evidence, in such a Manner, as to prevent Diffidence and Contention from coming in to interrupt and entangle Mankind, in the Performance of their several Engagements with each other; there was a fair and just Occasion for the Law to interpose it's Authority, and shew it's Use. And this the Law has done in this Case, by assigning the Degrees of Evidence, or appointing the Solemnities, by which the Consent essential in every Mandatum should be expressed, in proportion to it's specifick Differences: Sometimes admitting a Nod to be sufficient Evidence, or fictitiously carrying back a subsequent Ratification into the Place of a precedent Consent; sometimes requiring that the Consent should be expressed by the permanent Evidence of writing, or under the Hand and Seal of the Mandator; especially when a Power or Authority is to go with it: At other Times insisting, that the Consent should be made appear, and be supported by the Credit of an authentick Seal. And so careful has the Law been to preserve and maintain these specifick Differences, that, where it has prescribed the Degrees of Evidence, or the Solemnities that shall attend the giving the Consent, it will not admit, that it has been at all given, unless it shall appear to have been so deliberately given as to have pursued the Forms directed.

Now, though it be a Proctor's Business to act in another's Stead with his Consent, and a Proxy does on that Account come under the Genus, *Mandatum*, and is sometimes so called; as every Peer of the Realm comes under the Genus, Man, or a more comprehensive Genus; yet, as it would be highly injurious, and a Means of confounding all Order and Distinction in the World, to speak of, or deal with them, merely with a Respect to any one of those general Characters; so likewise to look upon a Proxy, or speak of it merely as it is a Mandatum, is to set aside those Distinctions which the Nature of Things makes, and the Law has thought necessary

cessary to be observed in the several Species, ranked under the general Name, *Mandatum*.

That the Distinctions I have been speaking of are real, and especially that a Proxy contains more than a *Mandatum* in it's general Signification, appears from *Lyndwood's* Account of it; where he defines it to be *Mandatum sive Litera in quibus continetur Potestas alicui Procuratori concessa*. Acts founded upon a bare Consent, are by *Peckius* distinguished from those, which besides a Consent, import likewise an Authority to have been given with it: And the Way he takes to set forth their Difference, shews it to be not without Reason, that the Canon has appointed Proxies to be exhibited in *Ingressu Litis*. *Autoritas quæ est Fundamentum Solennitasque actus* qui absque ea in pendentem esse non potest in ipso negotio necessaria est dum agitur. *Consensus autem vel voluntas sive procedat sive subsequatur non interest*. And without citing farther Authorities, the very purpose of a Proxy, as it impowers one Man to appear and act in Judgment in another's stead, in such Manner that the Party shall be concluded by what his Proctor does, not only requires that the Proctor should have the Party's Consent, but that he should have it evidenced in a full and solemn Manner: Lest Disputes and Grievances should grow up in the very Way marked out for terminating them; and, what is much regarded by the Law, *ne Judicium fiat elusorium*; Or (as it is expressed in the Decretal, requiring Proctors to have *Mandatum legaliter factum*) *ut quicquid actum fuerit jure subsistat*. X. 1. 38. 1.

This Distinction taken and cleared between *Mandatum*, & *Mandatum Procuratorium*, or *Procuratorium*, (for it is commonly used substantively) will dispel all the Cloud, which may be spread about this Question, from numerous Volumes of the Civilians and Canonists, from the Books of Comments on the *Regulæ Juris*, and from the *Concilia*; as it will be a full Answer to all Quotations from *Antonius Natta*.

But that those, who hold the Rule *Mandato æquiparatur Ratihabitio & retrahitur*, and enlarge most upon it, do not intend it shall be applied in this Case, will yet more evidently appear from the Exceptions, whereby they limit it's extent. It would be endless to collect them all and their Authorities. One joined with the Canon of 1603, stands in direct Opposition to Mr *Holman's* Pretensions to any Advantage from it in his Case. *Ratihabitio non convalidat Actum gestum ab alio pro tertio quando Statutum requirit Mandatum à Principio*. - - - *Statutum requirit Mandatum certum* &

Et verum: Ratificatio autem est Mandatum fictum; ergo non est satisfactum Statuto. With this Limitation of *Tuscius*, *Verb. Ratificatio: Conclusio. 23.* compare the Words of the 129th Canon. - - - Or unless in the Beginning of the Suit, he be by a true and sufficient Proxy thereunto warranted; - - - and you will find the Proxy required by the Canon, is not answered by a Ratification. Nay, if Ratifications had been in use at that Time, one would have concluded the Canon had levelled directly at them; to drive them out of Practice then, and to keep them out for the future. Another Exception wholly shuts out Mr *Holman*, and all *Intentatores Falsitatis*. *Gesta per eum qui dixit se habere Mandatum Et non habebat, non possunt Ratificatione convalidari.* Again, *Gesta in Judio à falso Procuratore, ut quia dixit se Procuratorem Et nullum habebat Mandatum, ex quo obtinuit per Surreptionem, non possunt ratificari; ideo si Testes induxit tanquam Procurator cum non esset, non convalidatur Examen per Ratificationem.* Again, *Ubicunque intervenit Falsitas Et Obreptio, ut quia dixit se Procuratorem cum non esset, non potest fieri Ratificatio.* *Tuscius. verb. Ratificatio. Conclusio 23.* *Peckius*, in his Comment on the Rule, thus expresses himself upon this Exception to it. *Quamvis Falsi Procuratoris Factum ratum haberi subinde possit: non tamen potest ratum haberi, si is Audaci Mendacio munitus, coram Principe comparuerit, Et Mandatum se habere illic mentitus sit.*

Another Exception *Jason* makes, who defends the Rule in general, and is vouched by Mr *Gaill*. *Septimo limita: quando sententia lata pro Falso Procuratore esset lata contra Adversarium præsentem, secus si esset lata contra absentem citatum, tunc Dñs non possit eam ratam habere; Ratio, quia Citatio non arctavit Adversarium, ex quo ille non erat Procurator; Et sic lata fuit contra Absentem non contumacem: ergo est nulla ratione defectus solennitatis: ergo Dñs ratificare non potest.* *Jason*, in *Cod. de Procurat. l. licet*. Mr *Holman* may remember that Part of the Proceedings he aims to support, and justify by the help of his Ratification, is a pretended Sentence of Excommunication, decreed and pronounced against an Appellate, presumed to be contumaciously absent, in order to compel him to appear; whereas the Exception *Jason* here makes expressly, excludes a Ratification in that Case, as not being sufficient to induce the Contumacy, which he, upon the feigned Authority of a Proxy, had accused and punished.

Another Restraint of this Rule, very material in this Case, is, that a Jurisdiction cannot be founded on any Act, that

is to be made good by a Ratification. *Limita in iis quæ pertinent ad fundandam Jurisdictionem Judicis vel Arbitri; quia si sunt facta à Falso Procuratore non possunt ratificari. Tuschus. Verb. Ratificatio. Conclusio. 23.* Sir, The Jurisdiction of this Court, depends not only upon the Reality of the Appeals before you, but also upon the Reality and Sufficiency of that Authority, by which the Proctors have appeared, exhibited, and proceeded on them, for three or four Years. If the Proctors all that while, had no Authority from their Principals, or, in Mr *Holman's* new Phrase in his pretended Appeals, from their Clients, the Court could have no Jurisdiction all that while: And if the Authority of the Proctors was of the lame and imperfect Kind, which stood in need of a Ratification from their Principals in the Country, to support and help it forward; the Jurisdiction of the Court, all that while, must have remained dormant, or stood in Suspence, till the Pleasure of those Principals was farther known, and Ratifications sent up to awake and set it going: that is, in effect, the Court had a Jurisdiction all that while, if the Principals at any Time afterwards should think fit to give it. And what else is this? but giving the pretended Appellants the Liberty of saying, if the Court and the Proctors in our Names do what we like, we will take it to ourselves, ratify, and stand by it: But if they do otherwise, let them look to it, that did it; for our Parts, we must desire to be excused. What a strange sort of Liberty is this for any Suitors to take with a Court of Judicature? And yet it is very evident, that this new Device of a Ratification gives it them, whether they shall take it or not. And should it be given likewise, as is both fair and equal, to the adverse Parties; it will make the publick Administration of Justice in all Ecclesiastical Courts, to be nothing better than solemn trifling. For I take it for granted, that neither this nor any other Ecclesiastical Court can compel any Man to ratify, what a Proctor of the Court has there done in his Name; unless the Proctor can shew that Court, that he had a sufficient Warrant from the Party for intermeddling in his Affairs: And surely no Ecclesiastical Judge can, or will certify, that the Proctor had a sufficient Warrant, or was in any Sense the Party's true and lawful Proctor, unless it appeared he was so in some Sense, and some Manner, which the Ecclesiastical Law has appointed, acknowledges, and will maintain. Ordinaries in such a Case, are confined to the Rules of their own Law, and would not be allowed, in Justification of their Certificates, to shew that the Proctor's
Mandate

Mandate was such as would have been deemed a sufficient Warrant in the Temporal Courts: That being a Matter which the Temporal Courts have no need of knowing, and therefore will not know, from their Certificates. For the Credit given to their Certificates, tho' it be a fundamental Part of our Constitution, and the Means of connecting the Civil and Ecclesiastical Jurisdictions, and reducing them into one Establishment; yet it depends wholly upon a Presumption, that they understand and proceed according to the Rules of their own Law. And should Ordinaries be seen to vary from their own Law, or assume the Liberty of introducing Practices inconsistent with it, it would not be enough to say of it, that they would thereby undermine the Credit of their own Certificates, in the several Instances wherein they should be seen to take that Liberty: For besides that, it would give Occasion to make their Certificates traversable in the Temporal Courts; which is the direct Road to set the Civil and Ecclesiastical Jurisdictions at Variance with each other, and ends in a fundamental Breach of the Constitution.

Another Exception to the Rule, arises from the Time prescribed for interposing an Appeal. For though it should be admitted, that a Ratification three Years after, would supply the want of a Mandate, or the want of any of the Solemnities in a Proctor's Mandate; yet, if any one Act done by him in that Capacity, should have a Time specially fixed and limited by Law for doing it, the Ratification, as to that Act, must also come within the Time limited to the Act itself. Now this is the very Case of an Appeal; which can no more be ratified, than interposed after fifteen Days; the uttermost Enlargement given by the Statute of Appeals, to the ancient Restraint of ten Days. I challenge the Gentlemen on the other Side to shew any the least Countenance, the Law, or any Lawyer, any where gives to the contrary. Nor would it be too assuming on this Occasion to say, as Serjeant Levinz formerly was used to do; this is the Point of Law, speak to it, if you have any Thing to oppose. It is Lancelot's uncontroverted Dictate: *Sit itaque Regula quod Appellatio debet omnino interponi infra decem Dies à recitatione Sententiæ, de Momento ad Momentum computandos; alias est de jure nulla & non devolveret. Quam Regulam amplia, quod sicut Appellatio, ita & Appellationis Ratificatio debet intra decem Dies fieri. Lancelot, de Attent. Lim. 20. n. 53. Peckius is very peremptory and concise on the same Head. Si Quis ratam habet post Decendium Appellationem ab alio*

ante interpositam, inanis est Ratihabitio. So Decius. *Ratificatio appellationis interpositæ debet fieri infra Tempus datum ad appellandum.* Regula 60, *Semper qui.* Tuschus has a particular Conclusion or Chapter with this Title: *Ratificatio Appellationis intra quantum Tempus fieri debeat ut valeat.* Where this occurs: *Eadem Solennitas quæ requiritur in primo actu, eadem requiritur in Ratificatione; & propterea sicuti Appellatio non valet post decem Dies, ita nec Ratificatio Appellationis.* The same Tuschus in another Chapter speaks to the very Point; as if he had the *Regula Juris* in view, and guarded against Mr Holman's Application of it. *Ratificatio Appellationis interpositæ in Termino decem Dierum facta post decem Dies non trahitur retro. verb. Ratificatio Conclusio. 21.*

These Things, thus positively laid down by the Authors cited, were not spoken inconsiderately. They give their Reasons for what they say, which are worth remarking.—*Requirit quod id, quod Ratificatur, sit Ratificabile; videlicet fiat in Tempore, quo Ratificatio possit operari.—Amplia, quia Ratificatio requirit, quod actus confirmatus existat Tempore Confirmationis.* Tuschus, *Ratificatio. Conclusio. 18. Locum non habet Ratihabitio* (says Peckius) *quando id quod ratum haberi petitur, ipso jure est extinctum,—quando actus gestus nullus est.* Apply the same Reason to the present Case. The Appeals, which the Proctors are said to have interposed in the Behalf of the Parties, though without any Authority or Commission for what they did, were the legal Appeals of the Parties, or were not so, within the fifteen Days limited by the Statute. If they were, they needed no After-Act or Confirmation from the Parties: If they were not so, the Party's Confirmation is now brought in to strengthen and support what is not in Being. The Statute, which, besides the Limitation of Time, has such strong negative Words, “in Manner and Form as hereafter ensueth, and not otherwise,” excludes all conditional or eventual Appeals. They must be, if they are to be, the Appeals of the Parties within fifteen Days, or they cannot be so at all; otherwise, the Limitation of Time would be wholly ineffectual and superfluous.

What Peckius farther adds, is such an exact Limitation of the Rule, as shews what a Ratification will do, and what it will not do in regard to the Act of constituting a Proctor; as it likewise explains and justifies, what I have before observed, in speaking of the Nature of a Mandatum, in the Sense of the Civil Law. *Locum non habet Ratihabitio, quando actus peccat in alio quam consensu;* that is, where the Law has prescribed any Circumstance of Place or Time, any Mode,
or

or Form, or any Solemnity, that shall attend or evidence the Consent; a Ratification, which would supply the want of the Consent, will not supply the want of what may seem to be but circumstantial in the giving it. But where the Law looks no farther than the Consent, without minding where, or when, or in what Manner, it be given, there a Ratification afterwards will do as well. *Oldradus de Ponte* (Conf. 328.) is more particular. *Constituendo Procuratorem ad quamcunque Appellationem non videtur eam ratam habere, posito quod habeat Locum Ratihabitio: quod negatur; quia non constat quod infra Tempus debitum ad appellandum hoc fecerit, quod necesse est. Item non procedit hæc Ratihabitio, si specialiter habuisset ratam talem Appellationem; quia Mandatum requirebat certam Formam: sed Ratihabitio non potest illa duo inducere, scilicet quod dicatur data Forma tali Mandato, & quod dicatur Mandatum, quia à Forma data non est recedendum, & Forma nunquam subintelligitur nisi probetur.* So *Tuschus*. *Ampliatio procedit & Extensio, quando Mandatum Procuratoris esset nullum ope Exceptionis: quia si non opponitur censetur approbata Persona talis Procuratoris; secus est quando Mandatum est ipso jure nullum: quia non fuit servata Forma & solennitas statuti.*

The Canonical Formalities of a Proxy have been already spoke of; that it be in writing, and be sealed; that the Day and Year be inserted; that it be a true one; that it be exhibited in the Beginning of the Suit. And we now find that none of these can be supplied by a Ratihabition, in the Judgment of those who make a Ratihabition equivalent to a Mandate.

But there is besides these one Formality superadded to a Proxy by the Statute-Law of the Realm, which certainly will not be evaded by the Help of any, or indeed all the Rules both of the Civil and Canon-Law; the Formality I mean is, that it be legally stamped: And till the King's Duty be paid, a Procuration, however otherwise formal, is not available in Law; and cannot be produced, or used as such, to validate Proceedings. A Stamp is now of the Form of it, constitutes it a Procuration. If instead of this Ratihabition, a Procuration had been at first produced, executed in regular Manner and Time, but wanting only Stamps, would such a Mandate to the Proctor's have given them a sufficient Authority for what they were doing? No; the Statute intervenes, and makes that unavailable to them, which is to make every Thing they do of any avail. For I apprehend that where the Law has made a Writing, an Instrument necessary to any Act, and has made a Stamp necessary to that Writing

Writing or Instrument; it has made a Stamp previously necessary to the Act it self. The Act shall be as unavailable by the Stamp-Law as the Instrument would be, without the Duty paid.

These Things, I own, are more proper to be inquired into, and considered of, by the Courts of the King's Revenue. But since all his Majesty's Courts, the Ecclesiastical as well the Temporal, are supported by his Authority, and flourish under his Protection; I may hope it will not be deemed impertinent in this Court, that, when I was shewing the Illegality of those Methods which the Proctors have taken in dealing with me; I have concluded with pointing out one Defect, wherein they trespass likewise upon his Majesty's Revenues.

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